U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099
(757) 873-3634 (FAX)

Issue date: 18Jun2002

Case No.: **2001-LHC-2087**

OWCP No.: **5-93162**

In the matter of

EARNEST L. SMITH,
Claimant,
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer (Self-Insured).

DECISION AND ORDER

This proceeding arises from a claim filed under the provision of the Longshore and Harbor Workers Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia, on August 15, 2001 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

The Claimant and the Employer have stipulated to the following:

The parties have submitted JX 1 which is a copy of a June 17, 1998 decision issued by the undersigned on behalf of Mr. Smith. Stipulations at that time included

14(e). That as a result of the injury sustained on July 24, 1994, the Claimant is entitled to permanent partial disability benefits from April 1, 1998 to the present and continuing, at the rate of $303.55 per week;

16. That Claimant's permanent partial disability is not caused by his July 24, 1994 groin injury alone, but is materially and substantially contributed to by his April 15, 1990 and September 11, 1992 groin injuries and his pre-existing chondromalacia.

17. That the Employer furnished the Claimant with medical services in accordance with the provisions of Section 7 of the Act.

All of the stipulations were accepted by the undersigned. The District Director conceded Section 8(f) relief and the decision granted such to the Employer.

There are no additional stipulations in this case.

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[1] The following abbreviations will be used as citations to the record:

JS - Joint Stipulations;
TR - Transcript of the Hearing;
CX - Claimant's Exhibits; and
EX - Employer's Exhibits.

Issues

1. The Office of Administrative Law Judges authority to hear and decide the case.

2. Entitlement to a motorized wheelchair.

3. Entitlement to payment for a wheelchair air ramp.

Jurisdiction of Office of Administrative Law Judges

The Employer states that

> This Court should dismiss the claim before it because there is no jurisdiction to address matters of medical treatment at this level. The regulations that implement the Act clearly relegate determinations regarding the necessity of medical treatment to the District Director. Appeals from those decisions lie with the Benefits Review Board. This Court plays no role in such determinations, and the Claimant's attempt to raise issues regarding the medical necessity of his wheelchair and ramp should fail. The Claimant's appeal of the District Director's refusal to fund the motorized wheelchair and ramp lies only with the Benefits Review Board. This Court is without jurisdiction and should dismiss the claim.
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> The regulations that govern this issue are clear. Under 20 C.F.R. § 702.407, the Director is specifically assigned the duty of supervising the actual medical treatment of claimants. According to the regulation, "[s]uch supervision shall include: ... [t]he determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee." 20 C.F.R. §702.407(b).

The Claimant states that

> It is unquestioned that had the parties simply rejected the district medical Director's recommendation, the matter would have been immediately transmitted to the ALJ for adjudication. While it is true that the District Director has jurisdiction over supervision of medical care, the Act does not specifically prescribe an ending to all litigation at this juncture. Where a claimant is not satisfied with

the results at the District Director level, requesting a formal hearing before the Office of Administrative Law Judges is not uncommon. (See e.g., Shriver v. General Dynamics Corp., 34 BRBS 370 (2000). Timmons v. Jacksonville Shipyards, Inc., 2 BRBS 125 (1975); Sanders v. Marine Terminals Corp., 31 BRBS 19(1997); Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984); Kelly v. Bureau of National Affairs, 20 BRBS 169 1 (1988)).

In Shell v. Teledyne Movible Offshore, Inc., 14 BRBS 585 (1984), the Board reasoned that to interpret the statute as binding the parties or the hearing officer by an impartial examination procedure would ultimately defy the plain language of the statute and its legislative history. Id at 585. Indeed it would undercut the Act's procedural principles while negating the Act's specific separation of duties between district directors and administrative law judges. This in turn would render formal adjudications unnecessary regarding crucial medical issues. Shell, id.

In Sanders v Marine Terminals Corporation, 31 BRBS 19 (1997), the BRB stated that

The Board has previously considered the issue of the administrative law judge's authority to resolve issues raised under Section 7(b) of the Act. In Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989), the Board considered a case in which the employer contended that claimant had not requested authorization for medical treatment and that the administrative law judge lacked the authority to order payment for the unauthorized treatment. The Board rejected the employer's contention that Section 7(b) of the Act and the implementing regulations authorize the Secretary and his designate, the district director, to oversee the provision of medical care to the exclusion of the administrative law judge. Anderson, 22 BRBS at 24. The Board noted that payment for expenses already incurred is governed by Section 7(d), and that the administrative law judge is authorized to resolve all factual issues presented in a claim referred to him for adjudication. The Board held that whether authorization for treatment was requested by claimant, whether employer refused the request, and whether treatment subsequently obtained was necessary were all factual issues within the administrative law judge's

> authority to resolve. Id. Moreover, the Board has held that in cases in which the treatment had already taken place, the administrative law judge has the authority to determine the reasonableness and necessity of a medical procedure refused by employer. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 99 (1991), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).
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> The Board also stated that
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> unresolved disputes regarding medical benefits are subject to the procedural requirements of these regulations, notwithstanding the general provisions of the Act that the Secretary is to oversee a claimant's medical care. A claim for medical benefits that raises disputed factual issues such as the need for specific care or treatment for a work-related injury must be referred to an administrative law judge for resolution of the disputed factual issues in accordance with Section 19(d) of the Act and the Administrative Procedure Act.

Thus, the undersigned does have authority to resolve the medical assistance aspects of this case.

Entitlement to a motorized wheelchair and a ramp

Claimant's counsel argues that Smith needs a motorized wheelchair and ramp and that such devices have been awarded to other workers pursuant to the Act.

> Dr. Vaughn, Mr. Smith's treating physician, opined that an electric wheelchair is the best option for Mr. Smith. Dr. Vaughn noted that Mr. Smith's pain is so severe that it limits his ability to walk or stand. He further opined that "any device that allows him to minimize the movement of his lower extremities significantly improves his life." (CX3). Most importantly, Dr. Vaughn has repeatedly opined that Mr. Smith's "quality of life" would greatly improve if he were allowed to use an electric wheelchair. (CX3a). It would greatly enhance his independence and would be helpful in restoring his shattering self esteem. (CX4).
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> Claimant's counsel contends that

The medical opinions of Dr. Michael F. Quinlan and CCN can properly be disregarded. Dr. Quinlan based his opinion on the fact that Mr. Smith may become too dependent on the wheelchair. He further noted that "there is nothing wrong with the patient's arms" and a non-motorized wheelchair would be appropriate. (EX2).

Counsel notes that Dr. Quinlan did not examine Quinlan, was not aware of pushing and pulling restrictions, and did not consider Dr. Vaughn's report that walking or movement causes problems.

CCN reviewed records and

concluded that Mr. Smith could modify his activity by using devices such as rolling walker, chair walker, or cane. As claimant has already explained above, the use of these devices would place added pressure on Mr. Smith's groin area. This causes the great pain in the testicles and abdomen described by Mr. Smith. Mr. Smith's treating physician has unequivocally opined that Mr. Smith's pain is exacerbated by movement. He further concluded that Mr. Smith has trouble walking. Accordingly, these devices would not be helpful and would only add to Mr. Smith's pain.

The Employer states that Dr. Vaughn has merely reported that

the motorized wheelchair would improve the Claimant's quality of life but never refers to a medical finding that makes the motorized wheelchair necessary (CX 3). Dr. Vaughn notes that "any device that allows [the Claimant] to minimize the movement of his lower extremities significantly improves his life" (CX 3). Neither of the letters from Dr. Vaughn indicate why a manual wheelchair, which serves that function, would not suffice to improve the Claimant's life quality.

The Claimant also relies on a letter from his psychiatrists, Dr. Meshorer and Dr. Esmaili (CX 4). It is notable that neither physician has treated the Claimant's medical problems, and their opinion is limited to "the psychiatric standpoint" (CX 4). The two doctors agree that the motorized wheelchair would operate to "enhance [the Claimant's] independence and would be very helpful in restoring his shattered self-esteem". (CX 4).

The Claimant has thus presented opinions treating the tangential benefits of having a motorized wheelchair, but neither reaches the issue of strict medical necessity. Neither the treating physician nor his psychiatrists have addressed the changes in the Claimant's physical condition to be alleviated by the motorized wheelchair.

At the hearing, the Claimant testified that currently

whenever I move or try to do anything to get around, I start to getting stabbing pains in my testicles and in my groin. It comes all the way up in my stomach and if I try to push or pull or lift, I get stabbing pains and I get no relief from it until I lay down. And I can't even take a bath. I can't get out of the tub. I have to get somebody to help me to get out of the tub. And cooking, I have to sit down in a chair that I've got with wheels on it to get around in the kitchen because I can't stand up and cook. And the pain is just so frustrating and there's nothing I can do about it and nobody else can do anything about it. (TR 19 & 20).

... I've got to push and pull on the wheelchair and I get these stabbing pains in my testicles and it comes all the way up in my stomach. And I'm sitting there and can't move the wheelchair. And I'm just stranded until I can get somebody to come and move me. I've got to depend on other people to get me out or to get me to the vehicle. I have no independence at all. (TR 22).

Employer's counsel asked

Q Mr. Smith, just a couple questions I think. You can walk? You have got a cane there today and you walked out of the car, into the elevator, and came up here? You're not tied down to a wheelchair. Is that right?

A No. I'm not tied to it because I don't have one.

Q Well I know, but this morning we're having a hearing in Newport News. You live in Suffolk, and you were able to ambulate enough to get into this Court Room?

A In pain. (TR 24).

In September 1998, Dr Vaughn, a practictioner in family medicine, stated

> Earnest Smith has been disabled by a chronic pain syndrome known as orchidalgia. His pain is so severe that it limits his ability to walk or stand. It is remarkable that simply with standing he develops excruciating pain, therefore any device that allows him to minimize the movement of his lower extremities significantly improves his life.
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> I realize that requests for electric wheelchairs often require a letter or prescription from an orthopedists, neurologist, rheumatologist or physiatrist, however I wish you would please reconsider. Mr. Smith has been to pain clinics and seen physiatists both in Portsmouth, Virginia and the Medical College of Virginia in Richmond. In addition he has seen at least three urologists and one neurologist in our area who agree that he has severe pain, but have provided no significant relief over the past several years.

In December 1998, the physician stated

> Please note that Mr. Smith's pain has been a part of his life since 1990. It does not seem to be improving at all and has essentially made Mr. Smith homebound. I strongly feel that Mr. Smith's quality of life would improve if he were allowed to use a motorized scooter, particularly one that would offer him some elevation or lifting. Please note again that Mr. Smith's pain increases significantly with any movement of his lower extremities and attempts in using a manual wheelchair which requires some movement of his torso also appears to increase his pain.

In October 2000, Dr. Vaughn informed Claimant's counsel that

> Mr. Smith and I have been unsuccessful in obtaining this scooter for over two years. Accompanying this letter are two earlier letters. The first letter dated September 24, 1998 was primarily written as a letter of medical necessity in order to obtain reimbursement from Medicare Part B. The second letter dated December 29, 1998 was mailed to Utilization Review at CCN. Finally there was a third letter to Ms. Johnette Shearn, Medical Management at Blue Cross Blue Shield in Richmond, VA dated April 29, 1999.

> At this time I still feel that Earnest Smith would greatly benefit from a motorized scooter. Mr. Smith unfortunately lives a very limited life due to severe groin pain or orchidalgia which in my opinion was caused by his injury at Newport News Shipyard. Hopefully this will be my last letter concerning his motorized scooter, however I will be happy to do whatever I can for both you and Mr. Smith in order that he obtain what I feel is medically necessary. (CX 3).

Dr. Vaughn has made notations on several prescription pads. The notations include POV (scooter), Jazzy1113 motorized wheelchair, and wheelchair ramp. (CX 1, CX 5).

Dr. Esmaili, a psychiatrist, and Dr. Meshorer, a psychologist, have signed a report which states

> In response to your recent letter, we are writing to clarify the need for the above named man to have a motorized scooter. From the psychiatric standpoint, this would benefit him as it would greatly enhance his independence and would be very helpful in restoring his shattered self-esteem.
>
> Prior to his accident he took great pride in his accomplishments and independence. That all changed due to his injury which has resulted in chronic pain, exacerbated by movement to the point where it is very painful for him to walk. He is currently having a very difficult time accepting and adjusting to his loss of function and a recurring theme in his treatment sessions, in addition to coping with pain, is his frustration with his dependence upon others to help him get around. He has a limited support system and relies primarily upon his brother to help him get to stores and appointments. His brother's availability is limited and not without interpersonal complications and Mr. Smith maintains that a scooter would greatly reduce this dependency, as many errands could be accomplished without help from others. (CX 4).

At the request of the District Director, Smith's records were required by Dr. Quinlan a physician employed by the Department of Labor. The physician stated

> I cannot recommend the purchase of a motorized scooter for the following reasons:

1) No pathophysiologic reason for the orchidalgia has been found which would require a wheelchair.

2) When there is a psychological component to a condition present according to Dr. Davenport's l0-9—95 note, a motorized wheelchair only reinforces the patient's opinion that he is too disabled to walk.

3) There is nothing wrong with the patient's arms. If his physician absolutely believes he needs a wheelchair, a non-motorized one would be adequate. (EX 2).

The Employer has submitted reports from CCN, presumably a medical reviewing firm staffed by physicians. In December 1998, Dr. Miller, the chief medical officer for CCN, sent a letter to the Employer and he stated

> Thank you very much for your letter of 12/9/98 requesting the clinical rationale which formed the basis of the review decision concerning the request by Dr. Lindsey Vaughn to obtain a motorized scooter for patient Earnest L. Smith. The clinical records in this case have been reviewed independently by two board certified CCN physician specialty advisors. The last review being performed by a physician who is board certified in Neurology and in active practice. The rationale is as follows:
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> > "The primary approach to this patient's medical problem should be directed at utilizing pain control efforts. This can most often be achieved by anesthesiology pain management consultants, with various types of nerve blocks or spinal stimulator devices. The patient can modify his activity with the assistance of other modalities such as a rolling walker, chair walker or cane while receiving the recommended therapy. Therefore, the purchase of a motorized scooter was not found to be medically necessary."

In January 1999, Dr. Miller informed Dr. Vaughn that

> As Chief Medical Officer of CCN, I have had a specialty advisor (Anesthesiology/Pain Management) review the medical record and rationale for non-certification relating to the above-referenced patient.

Following a review of the initial medical information and any other information presented with the request for reconsideration the initial decision has been UPHELD. The details of this decision are as follows:

> A review by our Specialty Advisor (Anesthesiology/Pain Management) fails to support the medical necessity for the use of a motorized scooter. Non-Certification of (Claim #199401746) for the use of the Motorized Scooter, will continue.

In January 2001, Dr. Garner, Medical Director, Utilization and Quality Management Services for CCN, informed the Employer that

> Thank you very much for your request concerning the clinical rationale which formed the basis of the review decision concerning the proposed motorized scooter for the above named patient. The clinical records in this case have been reviewed by a board certified CCN physician specialty advisor. The rationale is as follows:
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> > "All past medical records made available have been reviewed in detail. This is a 46-year-old male with a diagnosis of orchialgia. Since the patient's initial work related injury he has been evaluated by pain management/anesthesiology, neurology, psychology and urology. It was noted by the psychologist that the patient has a multitude of problems with serious psychologic overlay. As stated in the previous rationale it was recommended that the patient utilize the assistance of other modalities such as a rolling walker, chair walker or cane. The patient's neurologist previously stated that the patient has improved and his gait was not affected. The patient's treating physician states that there is no objective data to support his complaints and that his treatment plan has not changed since 1998. Therefore, the decision remains the same, in that the purchase of a motorized scooter is not medically appropriate for this patient." EX 1).

Section 7(a) of the Act provides that employer must furnish "medical, surgical, and other attendance or treatment, nurse and hospital service, medicine,

> crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532. 539 (1979). (See James v. Pate Stevedoring Co., 22 BRBS 271 (1989)).

In this case, Dr. Vaughn recommended use of a motorized wheelchair because Smith had pain on movement of the lower extremities and also the use of such a device would lessen such movement. Drs. Esmaili and Meshorer report that the device would be psychologically helpful in increasing Smith's independence.

However, Drs. Quinlan, Miller, and Garner noted that Smith's gait was not affected and that his primary symptoms could be lessened by other measurers such as nerve blocks, canes, and walkers.

The undersigned has considered Slade v. Coast Engineering & Manufacturing Co., (BRB Nos. 98-646 & 98-646A)(Feb. 2, 1999)(Unpublished) and other cases. While a motorized wheelchair and a ramp may be reasonable the undersigned does not find that these are necessary for treatment of the work-related injury.

ORDER

Claims for a motorized wheelchair and for a wheelchair ramp are **DENIED**.

A

Richard K. Malamphy
Administrative Law Judge

RKM/ccb
Newport News, Virginia